

NTSB Order No.
EM-154

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 2nd day of May, 1989

PAUL A YOST, Commandant, United States Coast Guard,

v.

GARY S. LEWIN, Appellant.

Docket: ME-137

ORDER DENYING MOTION

The appellant on March 9, 1989 filed a motion seeking leave to file with the Board a notice of appeal more than 10 days after service of a July 12, 1988 decision of the Vice Commandant sustaining a suspension of his merchant mariner's license.¹ Because we find, as discussed below, that the motion and supporting documents do not establish good cause for accepting the notice of appeal out of time, we will deny the motion.

Appellant's notice of appeal was tendered some eight months late because he initially filed his appeal from the Vice Commandant's decision with the U.S. District Court for the District of Oregon rather than with the Board. When that Court, on the government's motion, dismissed the action for want of jurisdiction,² appellant submitted his notice of appeal to the Board along with the instant motion for leave. Appellant, by counsel, submits that the Board should excuse the tardiness of the notice because he reasonably believed that the "appeal should be

¹The Coast Guard has filed a reply opposing the motion.

²In its motion to dismiss the government argued not only that appellant had failed to exhaust his administrative remedies by not appealing the Vice Commandant's decision to the Board, but also that appellant was in the wrong court since review of Board decisions in such cases lies exclusively in the U.S. courts of appeals.

taken elsewhere" (Memorandum in Support of Appellant's Motion for Order Allowing Late Filing of Notice of Appeal at p. 2). We are not persuaded that appellant's asserted filing error can fairly be characterized as reasonable.

Appellant asserts, in effect, that he did not file a timely notice of appeal with the Board because he was confused by the fact that neither the statutory provision which empowers the Board to review Coast Guard suspension and revocation decisions affecting merchant mariners, namely, 49 U.S.C. §1903(a)(9)(b), nor its implementing regulations (see 49 CFR Part 825), references the statutory provisions under which the Coast Guard suspended his license, namely 46 U.S.C. §§7701-7703. In our judgment, this circumstance provides no justification for the failure to file a timely notice of appeal with the Board. Any confusion that counsel's reading of 49 U.S.C. §1903(a)(9)(b) in isolation may have engendered should not have survived the most elementary research on the issue and, even if it did, it would not explain why he chose, notwithstanding any doubt concerning the Board's jurisdiction the statute may have produced, to disregard the unequivocal provision in the Coast Guard's regulations, issued under the authority of 46 U.S.C. §§7701-7703, indicating that the Board was the forum for an appeal from a decision of the Commandant affirming an order suspending or revoking a merchant mariner's license. See 46 C.F.R. §5.713.³ Indeed, it seems to us that given the clear direction in that regulation as to how to proceed with any further appeal, an attorney would be derelict in the representation of his client if he elected not to file a timely notice with the Board because of uncertainty over the basis for the Board's authority to review a Coast Guard decision the Coast Guard regulations indicated the Board had.⁴ The filing of a protective appeal with the Board would

³46 CFR §5.713(a) provides as follows:

"§5.713 Appeals to the National Transportation Safety Board.

(a) The rules of procedure for appeals to the National Transportation Safety Board from decisions of the Commandant, U.S. Coast Guard, affirming orders of suspension or revocation of licenses, certificates, or documents are in 49 CFR Part 825. These rules give the party adversely affected by the Commandant's decision 10 days after service upon him or his attorney of the Commandant's decision to file a notice of appeal with the Board."

⁴Appellant could also have requested an extension of time for filing the notice pending resolution of any jurisdictional issue. In this regard, we note that appellant appears not to have made inquiry of either the Coast Guard or the Board as to

not have precluded appellant from subsequently challenging the Board's jurisdiction in another forum.

Apart from the wholly unexplained and ill-advised disregard of the Coast Guard's regulation on appeals beyond the Commandant, we do not think that the fact that 49 U.S.C. §1903(a)(9)(B) does not on its face reference 46 U.S.C. §§7701-7703 would lead an attorney exercising an appropriate degree of diligence to conclude that any appeal from the Commandant's decision should be taken somewhere other than the Board. Had counsel for appellant looked at the statutes to which section 1903(a)(9)(B) does refer, and obviously no judgment as to their possible applicability could be made without checking them, he would have discovered, among other things, that 46 U.S.C. §239, a provision of law that formerly set forth (in §239(g)) the Coast Guard authority (acting by delegation) to suspend or revoke seaman licenses and documents for various enumerated offenses, had been repealed in 1983 and that its essential content had been contemporaneously re-enacted in 46 U.S.C. §§7701-7703. While this information might not have convinced him that the Board had jurisdiction, inasmuch as the Board's statute has not yet been amended to reflect that the Coast Guard's suspension-revocation authority has been recodified and renumbered, it would have at least dispelled any view, born of inadequate research, that section 239 and sections 7701-7703 did not deal with the same subject matter.

In light of the foregoing we are unable to find that appellant had good cause for failing to file a timely notice of appeal with the Board.

ACCORDINGLY, IT IS ORDERED THAT:

1. Appellant's "Motion for Order Allowing Late Filing of Notice or Appeal" is denied, and
2. The notice of appeal is dismissed.

KOLSTAD, Acting Chairman, BURNETT, LAUBER, NALL and DICKINSON, Members of the Board, concurred in the above order.

any perceived discrepancy between the Coast Guard's regulation and the board's statute over the scope of the Board's review of Commandant decisions.